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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TOM MILWICZ et al., Plaintiffs and Appellants, v. PUBLIC STORAGE, Defendant and Respondent.	B212266 (Los Angeles County Super. Ct. No. BC373261)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Reversed and remanded as to Tom Milwicz; affirmed as to Leslie Milwicz.

Law Office of Mayo L. Makarczyk and Mayo L. Makarczyk for Plaintiffs and Appellants Tom Milwicz and Leslie Milwicz.

Freeman, Freeman & Smiley, Dawn B. Eyerly and Ashley Dawkins Hunt, for Defendant and Respondent Public Storage.

Tom Milwicz and Leslie Milwicz appeal the trial court's dismissal of their claims against Public Storage for the loss of their personal property after Public Storage sold it at auction without providing notice. The trial court sustained demurrers without leave to amend to the Milwiczes' claims for negligence, breach of contract, breach of the covenant of good faith and fair dealing, and conversion based upon a release of liability in the rental contract. We reverse and remand as to Tom Milwicz.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The Milwicz's Rental of the Public Storage Locker.

On February 7, 2004, Tom Milwicz signed a contract for the rental of a storage space with Shurgard Storage, Public Storage's predecessor in interest, at a facility located on Balboa Boulevard in Los Angeles. At the time he entered into the contract, Shurgard Storage represented that the storage facilities were safe, secure and protected with anti-theft devices. Milwicz stored personal property, including heirlooms, holiday decorations, family photographs, and furniture at the storage facility worth in excess of $250,000.

The rental contract provided in relevant part that:

"The Storage Unit should not be used to store jewels, furs, heirlooms, art works, collectibles, or other irreplaceable items having special or emotional value to tenant. . . . [¶] . . . Tenant agrees to hold Landlord, other tenants and third parties harmless and indemnify, save, and defend such persons from any loss resulting from the violation of this provision. Tenant grants Landlord permission to enter the Storage Unit at any time for the purpose of removing and disposing of any property kept in the Storage Unit in violation of this provision. [¶] . . . [¶] . . . The Storage Unit is under the exclusive control of Tenant. Landlord does not take custody, control, possession or dominion over the contents of the Storage Unit and does not agree to provide protection for the Self-Storage Unit, or the contents thereof. . . . Landlord will not be responsible or otherwise liable, directly or indirectly, for loss or damage to the property of Tenant due to any cause . . . regardless of whether such loss or damage may be caused or contributed to by the

negligence of Landlord, its agents, or employees. [¶] . . . [¶] Tenant agrees that the maximum liability of Landlord to Tenant for any claim or suit by Tenant, including but not limited to any suit which alleges wrongful or improper foreclosure or sale of the contents of a storage unit is $5,000. . . . [¶] . . . [¶] California Business and Professions Code Section 21700 et seq. provides that Tenant's property will be subject to a claim of lien and may be sold to satisfy the lien if the rent or other charges due remain unpaid for 14 consecutive days."

Sometime after he rented the unit, Public Storage failed to notify Milwicz in writing or by telephone that his property stored at Public Storage's facility would be sold at auction. When Milwicz learned that his property had been auctioned off, he contacted Public Storage to learn the identity of the purchasers. Public Storage refused to assist him, and refused to identify the purchasers.

2. The Milwiczes' Complaint.

On June 25, 2007, Milwicz, his wife Leslie and daughter Kimberly filed their complaint stating claims for negligence and conversion against Public Storage. The complaint sought damages, attorneys' fees, and punitive damages.

Public Storage demurred to the complaint, and moved to strike the requests for attorneys' fees and punitive damages. Public Storage argued that the Milwiczes had failed to allege their claims with specificity, and in particular failed to attach a copy of the contract; failed to identify the property converted; and failed to allege any facts constituting negligence. Public Storage's motion to strike argued that the Milwiczes had not alleged contractual claims supporting an award of attorneys' fees, or facts sufficient to support a claim for punitive damages.

The Milwiczes did not oppose the demurrer.

3. The Milwiczes' First Amended Complaint.

On October 26, 2007, the Milwiczes filed a first amended complaint (FAC) alleging claims for negligence, conversion, breach of contract, and breach of the covenant of good faith and fair dealing. The FAC attached a copy of the contract, and alleged that Public Storage breached the contract by unlawfully disposing of plaintiffs' personal

property, prevented them from mitigating their damages by refusing to identify the purchasers at auction, and breached the covenant of good faith and fair dealing by unfairly and unreasonably interfering with plaintiffs' right by selling and disposing of their property. The Milwiczes alleged that Public Storage negligently trained and managed its employees and breached its duty to prevent the loss of their property, and converted their property by selling it to a third person.

Public Storage demurred to the FAC, arguing that: the contract's express terms waived the Milwiczes' contract and tort claims; the conversion claim failed to specifically identify the property converted; Mrs. Milwicz's and Kimberly's claims failed because they were not parties to the contract, and did not own any of the subject property, and Public Storage owed them no duty. Public Storage moved to strike allegations relating to the value of the property and Mrs. Milwicz's and Kimberly's prayers for relief.

The Milwiczes filed a late opposition to the demurrer and motion to strike, arguing that Mrs. Milwicz and Kimberly were foreseeable victims of Public Storage's conduct, that Public Storage acted with gross negligence in selling or disposing of the Milwiczes' property, and that pursuant to Civil Code section 1668[1] and *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747 (*City of Santa Barbara*), Public Storage could not contract away its liability for gross negligence. Plaintiffs requested leave to amend.

Public Storage responded that any harm to Mrs. Milwicz or Kimberly was not foreseeable based upon the express terms of the contract, which was solely between Milwicz and Public Storage, and plaintiffs' claims were subject to waiver.

The trial court sustained the demurrer to all of Mrs. Milwicz's and Kimberly's claims without leave to amend. As to Milwicz's claims, the court overruled the demurrer to the conversion and breach of the covenant of good faith and fair dealing claims, sustained the demurrer to the gross negligence claim without leave to amend, and

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[1] Civil Code section 1668 provides, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

sustained the demurrer to the contract claim with 20 days leave to amend. The court granted Public Storage's motion to strike Mrs. Milwicz's and Kimberly's request for attorneys' fees and Milwicz's request for attorneys' fees on the negligence claim; the court granted the motion to strike the damages claim of $250,000 except with respect to the conversion claim; and denied the motion to strike Milwicz's claim for punitive damages.

4. Public Storage's Answer to the First Amended Complaint.

Public Storage's answer to the FAC denied the allegations of the FAC's claims for conversion and breach of the covenant of good faith and fair dealing.

5. Milwicz's Second Amended Complaint.

The court granted Milwicz's motion for leave to file a Second Amended Complaint (SAC) after the time for amending the claims of the FAC had expired. The SAC, which dropped Kimberly and Leslie as plaintiffs, alleged claims for conversion, breach of contract, and breach of the covenant of good faith and fair dealing. The SAC also sought attorneys' fees and punitive damages. Plaintiff now alleged that the contract's provisions waiving liability violated the Self Service Storage Facility Act (Bus. & Prof. Code, §§ 21702, et seq.) (SSSFA) and that Public Storage violated the SSSFA by failing to notify plaintiff his property would be sold at auction.

Public Storage demurred and moved to strike the attorneys' fees and punitive damages claims. Public Storage argued that plaintiff had not alleged facts showing oppression, fraud, or malice, and had waived all causes of action in the contract. It further asserted that plaintiff's conversion claim failed because he was not permitted to store the items he stored, and his breach of contract and bad faith claims failed to allege how Public Storage breached the contract or acted in bad faith.

Milwicz contended the breach of contract claim adequately pleaded that Public Storage sold his property in violation of the SSSFA's provisions requiring notice before goods are sold, that the conversion and bad faith claims had previously survived demurrer, and that pursuant to Civil Code section 1668, Public Storage could not contract

away its liability for an intentional tort. Plaintiff contended the contract provided for attorneys' fees, and he had alleged sufficient malice to recover them.

The trial court sustained the demurrer without leave to amend, finding that the contract validly limited Public Storage's liability on all three causes of action, and dismissed plaintiff's action.

DISCUSSION

The Milwiczes[2] contend that the pleadings properly allege that Public Storage willfully violated the SSSFA, that the exculpatory clauses in the rental agreement are invalid against their tort claims for negligence and conversion, that they have stated claims for negligence, conversion, breach of contract, and breach of the covenant of good faith and fair dealing, and that the court erred in dismissing Mrs. Milwicz from the action.

I. STANDARD OF REVIEW.

In reviewing the sufficiency of a complaint against a general demurrer, we assume the truth of all facts properly pleaded and review the complaint de novo to determine whether it states facts sufficient to state a cause of action. (*Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 180.) We accept as true the properly pleaded material factual allegations, together with facts that may be properly judicially noticed, and will reverse if the complaint alleges facts showing entitlement to relief under any possible legal theory. (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1444.) Where the demurrer is sustained without leave to amend, we give the complaint a reasonable interpretation, assuming to be true all material facts that have been properly pleaded; if there is a reasonable possibility that the plaintiff could allege facts that would cure the defect, we must reverse. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

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[2] Kimberly is not a party to this appeal.

II. THE ALLEGED VIOLATIONS OF THE SSSFA STATE A CLAIM FOR BREACH OF CONTRACT AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

Under the SSSFA, the owner of a self-storage company acquires a lien on all personal property of the tenant of a storage space. (Bus. & Prof. Code, § 21702.) The tenant must execute a rental agreement with the owner that establishes the terms and conditions regarding occupancy, which must include a statement that the tenant's property will be subject to a lien if rent is not paid within 14 days. (Bus. & Prof. Code, § 21701, subd. (d); 21712.) When rent is delinquent for 14 days, the owner may terminate the right of occupancy by sending a preliminary lien notice to the tenant at his or her last known address and at the alternate address specified in the rental agreement. The notice must provide: an itemized statement of the sums due and the due date; a statement that the tenant's right to use the facility will terminate on a specified date unless sums due are paid; a notice that access to the space will be denied unless sums due are paid; and the name, address and telephone number of the owner or agent with whom the tenant may communicate. (Bus. & Prof. Code, § 21703.)

Here, plaintiff alleged a failure to give the notice required by the statute and contract, a sale of his personal property items without such proper notice, and conduct that denied him the benefits of the contract. This constitutes a sufficient allegation of claims for breach of contract and a breach of the implied covenant of good faith and fair dealing. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388 [elements of breach of contract are a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and resulting damages]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [implied covenant of good faith and fair dealing in every contract that neither party will do anything that will injure the right of the other to receive the benefits of the agreement]; (*Lazar v. Hertz Corp*. (1983) 143 Cal.App.3d 128, 141 ["essence of the good faith covenant is objectively reasonable conduct."].)

The fact that Milwicz stored items having a value in excess of the contract does not excuse Public Storage's failure to comply with the terms of the SSSFA. The SSSFA is not, as Public Storage argues, advisory or discretionary. The statutes comprising the SSSFA set forth the requirements of a rental agreement and the steps a self-storage facility owner must take prior to availing himself or herself of the Act's provisions permitting foreclosure and sale of the tenant's property. (See, e.g., Bus. & Prof. Code § 21703 [notice of delinquency shall be sent by certified mail]; § 21704 [form of notice shall contain certain provisions]; § 21707 [advertisement of sale shall be published in newspaper of general circulation and shall include a general description of the goods].)

III. THE EXCULPATORY CLAUSES IN THE CONTRACT DO NOT RELIEVE PUBLIC STORAGE FROM LIABILITY FOR GROSS NEGLIGENCE OR CONVERSION.

Exculpatory clauses may exempt an actor from liability for ordinary negligence unless the public interest is involved or a statute expressly forbids it, and courts consistently uphold releases in agreements in the recreational setting. (*Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 74; see, e.g., *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1373.)

However, Civil Code section 1668 generally invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs (*Farnham v. Superior Court*, *supra*, 60 Cal.App.4th at p. 74), gross negligence (*City of Santa Barbara, supra*, 41 Cal.4th at p. 777, and claims of negligence "per se" predicated on a violation of law (*Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, 1083-1087). In addition, Civil Code section 1668 prohibits contractual releases of future liability for some negligence claims when "the 'public interest' is involved or [] a statute expressly forbids it." (*Farnham, supra*, 60 Cal.App.4th at p. 74; see also *Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 98.)

A. GROSS NEGLIGENCE.

In *City of Santa Barbara, supra,* 41 Cal.4th 747, the Supreme Court drew a distinction between "ordinary negligence" and "gross negligence"[3] with respect to exculpatory contracts. After noting there was no California authority on the issue, and analyzing cases from numerous out-of-state jurisdictions, the court concluded that contracts releasing liability for future conduct that was grossly negligent were generally prohibited under section 1668 as being against public policy. (*Id.* at pp. 776-777.) The Court noted that its public policy analysis was different from the "public interest" factors considered in *Tunkl,* which had focused on the overall transaction, with special emphasis on the importance of the underlying service or program, and the relative bargaining strength of the parties. (*Id.* at p. 762.) Rather, *City of Santa Barbara* focused on a separate and different public policy rationale focusing upon the degree or extent of the misconduct at issue to discourage aggravated wrongs. (*Id.* at p. 764.) In the case before it, which involved the drowning of a developmentally disabled child at a public swimming pool, the court held that an agreement purporting to release liability for future gross negligence as to a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and was unenforceable. (*Id.* at p. 777.)

We see no reason to depart from the general rule set forth in *City of Santa Barbara* and therefore conclude that parties cannot contract away future liability for *gross* negligence in a storage agreement subject to the SSSFA. Further, we do not read Business and Professions Code section 21713,[4] as Public Storage urges, to permit the

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[3] Under California law, "ordinary negligence" is the failure to exercise due care, while "gross negligence" is either "'a want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" (*City of Santa Barbara, supra,* 41 Cal.4th at pp. 753-754.)

[4] Business and Professions Code section 21713 provides, "Nothing in this chapter shall be construed to impair or affect the right of the parties to create additional rights, duties, and obligations in and by virtue of the rental agreement. The rights provided by

parties to contract away liability for gross negligence in abrogation of *City of Santa Barbara.*

Milwicz's FAC stated only a claim for ordinary negligence, namely, the failure to exercise due care, and alleges that Public Storage's employees "negligently interviewed, tested, trained, selected and managed its employees [such] that they could not properly manage the property where plaintiff's goods were stored," and that Public Storage had a duty to its customers "properly manage the storage premises in such a manner as to provide reasonable and appropriate steps to insure the safety and integrity of the items stored there." However, the facts indicate Milwicz can allege gross negligence – that Public Storage exercised "the want of even scant care or an extreme departure from the ordinary standard of conduct" (*Eastburn Regional Fire Protection Authority* (2003) 31 Cal.4th 1175-1185-1186) when it failed to notify him of the sale of his personal property. Therefore, on remand Milwicz should be permitted to file an amended complaint stating a claim for gross, rather than ordinary, negligence.

B. CONVERSION.

The tort of conversion is an "act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." (*Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 278.) In order to establish conversion, the plaintiff "must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property." (*Ibid.*) Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort. (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 812.) Because section 1668 prohibits contracts purporting to waive liability for intentional acts, the trial court erred in sustaining the demurrer to Milwicz's claim for conversion. (See *Farnham v. Superior Court, supra,* 60 Cal.App.4th at p. 78, fn. 6.)

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this chapter shall be in addition to all other rights provided by law to a creditor against his or her debtor."

IV. MRS. MILWICZ WAS NEITHER IN PRIVITY OF CONTRACT WITH PUBLIC STORAGE NOR A FORESEEABLE PLAINTIFF TO WHOM IT OWED A DUTY.

Privity of contract is required in order to maintain a suit on a contract. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1032.) In *Biakanja v. Irving* (1958) 49 Cal.2d 647, the Supreme Court considered the issue of the legal duty of one party to another in the absence of privity of contract. The court did not establish an unlimited scope of liability in favor of any person who might have received a benefit under a contract but for its negligent performance. The court emphasized that the "end and aim" of the transaction must be to benefit the plaintiff and the injury to the plaintiff from the defendant's negligent actions must be clearly foreseeable. (*Id.* at p. 650.) "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him [or her, 3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." (*Ibid*.) The principle underlying the *Biakanja* case is that "where the 'end and aim' of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third party or the protection of that party's interests, then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third party is not a party thereto." (*Adelman v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 352, 363.)

Here, Mrs. Milwicz was not in privity of contract with Public Storage and cannot allege a claim of breach. Further, this lack of privity precludes any claim for negligence or other tortious wrongdoing against Public Storage. Public Storage had no notice or

knowledge that her personal property was stored in the rental space, and she was therefore not a foreseeable plaintiff to whom it owed a duty.[5]

DISPOSITION

The judgment of the superior court is reversed as to Tom Milwicz. The matter is remanded to the superior court with directions that it vacate its order sustaining without leave to amend respondent's demurrers to Tom Milwicz's causes of action for negligence, breach of contract, breach of the covenant of good faith and fair dealing, and conversion. Milwicz shall be permitted to amend his claim for negligence to allege gross negligence. As to Mrs. Milwicz, the judgment is affirmed. Tom Milwicz shall recover his costs on appeal; respondent shall recover costs as to Mrs. Milwicz's claims.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

[5] Although her appeal was timely, because we affirm the judgment dismissing Mrs. Milwicz's claims, we need not address Public Storage's arguments that she cannot state a claim for relief.